

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES W. PATILLO, SR.,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 2 030 214)

DOCKET NUMBER
DA831M8610205-1

MAY 4 1989

DATE: _____

Norris W. Yates, Esquire, San Antonio, Texas, for the
appellant.

Reginald M. Jones, Jr., Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The Office of Personnel Management (OPM) has petitioned for review of the July 18, 1988, initial decision reversing its January 13, 1986, reconsideration decision finding that the appellant had incurred an annuity overpayment. For the reasons set forth below, the Board GRANTS OPM's petition, REVERSES the initial decision, and AFFIRMS OPM's

reconsideration decision confirming the existence of an overpayment.¹

BACKGROUND

The appellant retired from federal employment with more than thirty years of service on January 12, 1978. He was awarded a disability retirement annuity, the computation of which included approximately seven years of service credit for military service performed between 1943 and 1952. In response to a subsequent OPM request for verification of the appellant's military retired pay status, the Department of the Army certified that the appellant's receipt of military retired pay since July 1, 1952, was not based on a disability incurred in enemy combat or caused by an

¹ As a result of OPM's February 12, 1987 "notice of compliance" with an earlier Board determination concerning this matter, the amount of the overpayment as determined by OPM is no longer at issue here. In an April 14, 1986, initial decision, the administrative judge determined that OPM's "Age-of-Debt-Rule" precluded the collection of that portion of the overpayment which accrued more than three years prior to OPM's notification to the appellant of the existence of the overpayment. See *Patillo v. Office of Personnel Management*, MSPB Initial Decision No. DA831M8610205. The administrative judge consequently ordered OPM to waive \$19,446.27 of the \$35,236.20 overpayment amount. Although the Board has since vacated that initial decision, see *Patillo v. Office of Personnel Management*, MSPB Docket No. DA831M8610205 (Apr. 6, 1988), we find that OPM's compliance with the April 14, 1986, initial decision renders any further consideration of this issue unnecessary.

instrumentality of war.² Because the appellant had been receiving retired pay for his military service, OPM determined that he was not entitled to service credit for his military service in computing his civil service annuity. OPM calculated that the appellant had been overpaid \$35,236.27 as a result of the credit erroneously given for his military service, recomputed the appellant's annuity to exclude the military service, and scheduled collection of the overpayment to commence on January 2, 1986.

The appellant requested that OPM reconsider its determination, contending that he was entitled to credit for his military service because his military retired pay was a result of a disability caused by an instrumentality of war. Upon reconsideration, OPM rejected the appellant's claim of entitlement to military credit, and again confirmed the existence of the overpayment and the accuracy of the amount.

The appellant filed a petition for appeal of OPM's reconsideration decision with the Board's Dallas Regional Office. In an April 14, 1986, initial decision, the

² Section 8332(c)(2) of title 5 of the United States Code provides that military service may be credited in computing a civil service retirement annuity if the military retired pay is awarded:

(A) based on a service-connected disability . . . (i) incurred in combat with an enemy of the United States; or (ii) caused by an instrumentality of war and incurred in the line of duty during a period of war

administrative judge affirmed OPM's determination as to the existence of the overpayment and the accuracy of the amount, finding that the appellant was not entitled to credit for military service in computing his civil service retirement annuity because he was receiving military retired pay and was not covered by the exceptions set forth at 5 U.S.C. § 8332(c)(2)(A). The administrative judge further found that, under OPM's "Age-of-Debt-Rule," recovery of more than \$15,790.00 would be unconscionable because the appellant was without fault in creating the overpayment and \$19,446.27 of the \$35,236.20 overpayment amount accrued more than three years prior to OPM's notification to the appellant of the existence of the overpayment.

On April 6, 1988, the full Board reopened the appeal, vacated the April 14, 1986, initial decision, and remanded the case to the regional office for further adjudication in light of new evidence from the Department of the Army indicating that the appellant met the requirements of 5 U.S.C. § 8332(c)(2)(A). On remand, the administrative judge reversed OPM's determination that the appellant had incurred an annuity overpayment.

ANALYSIS

The Board will grant a petition for review on the basis of new and material evidence that was unavailable, despite a party's due diligence, prior to the close of the record. 5 C.F.R. § 1201.115(a). e, e.g., *White v. Office of*

Personnel Management, 24 M.S.P.R. 351, 353-54 (1984). After receiving the Board's April 6, 1988, remand decision, OPM sought clarification from the Department of the Army concerning the nature of the appellant's retired-pay award. OPM has now proffered with its petition for review a copy of the Army's response to its information request, a July 13, 1988, letter from the Army Reserve Personnel Center stating that the appellant's military retirement was not based on a service-connected disability resulting from injury or disease incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in the line of duty during a period of war. See Petition for Review File (PFRF), Tab 1, Subtab IV. The letter further provides a "synopsis of disability," stating that the appellant suffers from chronic, severe rheumatoid arthritis of undetermined cause. *Id.* This information wholly contradicts the information contained in the November 26, 1986, letter from the Reserve Personnel Center -- information that formed the basis for the Board's July 18, 1988, initial decision reversing OPM's reconsideration decision. Because the question of whether the appellant incurred an annuity overpayment is determined by the nature of the military retired pay awarded, and because this latest information from the Department of the Army was not received by OPM until July 18, 1988, we find that the letter satisfies the Board's "new and material evidence" criterion.

The appellant has the burden of proof of establishing that his military retired pay was awarded under circumstances that bring it within the exceptions of 5 U.S.C. § 8332(c)(2)(A). See *Gholston v. Office of Personnel Management*, MSPB Docket No. AT831M8710643, slip op. at 6 (July 26, 1988). We find that the new evidence submitted by OPM establishes that the appellant's military retirement was not awarded pursuant to either exception under section 8332(c) permitting credit for military service in computing a civil service retirement annuity. The appellant has not responded to OPM's offer of proof. Although this evidence directly contradicts the earlier information relied upon by the appellant and the Board, we find this more recent and more specific statement to be dispositive.³ See *Dickson v. Office of Personnel Management*, 37 M.S.P.R. 465, 468-69 (1988) (the Board is without authority to review the Department of the Army's determination of a retiree's military-retired status).

³ An additional letter from the Veterans Administration states that the appellant's service-connected disability is "not combat incurred as required in Section 8332C (sic) of Title 5, [United States] Code." See PFRF, Tab 1, Subtab V. This letter also constitutes "new" evidence, as it was not received by OPM until July 12, 1988, after the close of the record below. Although this letter is not in itself of sufficient weight to undermine the validity of the Department of the Army's 1986 certification of the appellant's military retirement status, we find that it is "material" to the matter at hand because it directly supports the latest statement from the Department of the Army concerning the appellant's status.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

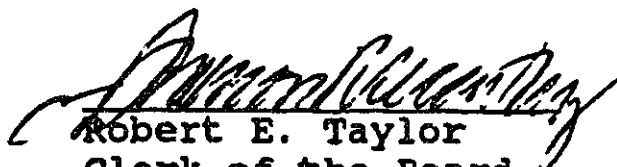
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board